File Date
July 17, 2006

(7)

No. 05-11287

IN THE SUPREME COURT OF THE UNITED STATES

BRENT RAY BREWER,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the lower court correctly upheld the state court's reasonable decision that Brewer's jury was not deprived of a constitutionally sufficient vehicle for considering and giving effect to his mitigating evidence.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas corpus proceeding in which Petitioner Brent Ray Brewer[1] unsuccessfully challenged his presumptively valid state capital murder conviction and sentence of death pursuant to 28 U.S.C. § 2254. In 2004, the district court below conditionally granted the writ regarding the punishment phase of Brewer's trial, but denied relief as to all other claims. *Brewer v. Dretke,* No. 2:01-CV-112-J, 2004 WL 1732312 (N.D. Tex. 2004) (unpublished order); PA:B1-11. The Director appealed and the United States Court of Appeals for the Fifth Circuit reversed. *Id.,* 442 F.3d 273 (5th Cir. 2006); PA:A1-9. In the instant petition, Brewer claims that the court of appeals erred when it held that the state court did not unreasonably decide his mitigating evidence was within the reach of the jury in answering the former Texas special issues. However, Brewer is wrong and this Court should deny certiorari review.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals of Texas succinctly summarized the evidence proving Brewer's guilt in its direct appeal opinion:

> The evidence adduced at trial shows that on April 26, 1990[, Brewer] and Kristie Lynn Nystrom convinced the deceased to give them a ride in his truck. [Brewer] rode in the back seat. After traveling approximately one block,

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[1] Respondent Nathaniel Quarterman will be referred to as "the Director." The following abbreviations are used herein: "PA" refers to the appendices to Brewer's petition; "RR" refers to the Reporter's Record of transcribed trial proceedings; "CR" refers t to the Clerk's Record of pleadings and documents field with the court during trial; "SX" refers to the numbered exhibits offered by the State and admitted into evidence at trial; "DX" refers to the numbered exhibits offered by the defense and admitted into evidence at trial; "SHCR" and "SuppSHCR" refer to the Clerk's Record and Supplemental Record of pleadings and documents filed with the court during state habeas corpus proceedings.

> [Brewer] stabbed the deceased several times in the neck while Nystrom held the deceased's right arm to prevent him from fighting back. The deceased's jeans were pulled down over his buttocks and a blood transfer stain from his wallet was found on his underwear. Nystrom was later seen with the deceased's blood-soaked wallet and truck keys. Further, [Brewer] stated to Skee Callan [*sic*] that he had killed a man for $140 — the same amount of money that the deceased was believed to have at the time of his death. Michelle Francis, [Brewer]'s and Nystrom's roommate, testified that neither [Brewer] nor Nystrom had any money earlier that day. However, both were later able to purchase bus tickets to Dallas.

Brewer v. State, No. 71,307, slip op. at 2-3 (Tex. Crim. App. 1994) (unpublished opinion).

In addition, an FBI forensic serologist determined that DNA from blood found on the steering wheel of the victim's truck was consistent with Brewer's DNA. 16 RR 342-60; SX 1B, 31, 40, 68A, 81A. More importantly, a bloodstained butterfly knife was found just outside the front passenger door of the victim's truck. 15 RR 24, 81, 135-38, 167, 170-71; SX 1, 8-9, 30-31, 89B. DNA from blood found on the knife matched both Brewer and the victim. 16 RR 359-60; SX 31. An FBI fingerprint expert also determined that Brewer's fingerprints and palm print were found on the right rear outside door handle as well as the right rear door frame of the victim's truck. 16 RR 400-03, 419-20; SX 4, 105-08. Brewer's bloody fingerprint was also found on the butterfly knife. 16 RR 408-09; SX 1, 31. Brewer was seen after the murders with a cut on his hand. 16 SR 433-34, 440-41; 17 RR 456-57; SX 69, 85. Finally, both Brewer and Nystrom were seen soaked with blood the night of the murder. 16 RR 433-35; 17 RR 454-55.

II. Direct Appeal and Postconviction Proceedings

On direct appeal, the Court of Criminal Appeals applied the appropriate Supreme Court authority to determine "whether the [deliberateness and future-dangerousness] issues

provided a vehicle for the jury to give effect to [Brewer's mitigating] evidence."[2] *Brewer v. State*, slip op. at 13-14 (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality opinion), *Eddings v Oklahoma*, 455 U.S. 104 (1982), *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), and *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion)). The state court summarized Brewer's three categories of mitigating evidence as follows:

> (1) [Brewer] was not mentally retarded,[3] but was involuntarily committed on January 1, 1990, for "major depression, single episode, without psychotic features, polysubstance abuse." The examining physician based his opinion on a suicide note [Brewer] wrote to his mother. On January 25, [Brewer] signed a request for voluntary admission to Big Springs [*sic*] State Hospital for fourteen days.[4]

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[2] The trial court instructed the jury, pursuant to TEX. CODE CRIM. PROC. Art. 37.071 (West 1991), as follows:

SPECIAL ISSUE NO. 1

> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, BRENT RAY BREWER, that caused the death of the deceased, Robert Doyle Laminack, was committed deliberately and with the reasonable expectation that the death of the deceased would result?

SPECIAL ISSUE NO. 2

> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, BRENT RAY BREWER, would commit criminal acts of violence that would constitute a continuing threat to society?

CR 289-90. Special Issue No. 1 is referred to herein as the "deliberateness" issue, while Special Issue No. 2 is referred to as the "future-dangerousness" issue.

[3] "Brewer has a tested IQ of 115, placing him in roughly the ninety-fourth percentile of human intelligence." PA:A9 n.25; 18 RR 652.

[4] ... [Brewer] chose not to enter the records from Big Spring State Hospital into evidence. [Rather, Brewer called China Long, a justice of the peace in Howard County, Texas, to

(2) [Brewer] came from an abused background where he was ignored by both his father and step-father. He did not have a relationship or live with his real father until after he was fifteen-years old.[5] [Brewer]'s father hit him on several occasions, once with the butt of a pistol and once with a flashlight. [Brewer]'s father frequently beat his mother. [Brewer]'s father had once told him, "if you ever draw your hand back, you'd better kill me because I'll kill you."

(3) [Brewer] smoked marijuana when he was a teenager.[6]

Id. at 15. The state court concluded that the special issues provided an adequate vehicle for the jurors to give effect to Brewer's mitigating evidence. *Id.* at 15-16. This Court denied certiorari review. *Brewer v. Texas,* 514 U.S. 1020 (1995).

Brewer then obtained appointed counsel in state court and filed a habeas corpus application on April 23, 1997.[7] SHCR 15-24, 37–221. The trial court declined to hold an evidentiary hearing and, on October 20, 2000, entered findings of fact and conclusions of law recommending that relief be denied. *Id.* at 340; SuppSHCR 3-7. Thereafter, on January 31, 2001, the Court of Criminal Appeals adopted the trial court's findings and denied habeas

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testify that she signed the commitment order. 18 RR 755-59; DX 5.]

[5] [Brewer] did see his biological father when he was five months old and for a short period of time when he was five years old. There is no evidence of abuse during either of these encounters.

[6] There was also evidence Brewer was obsessed with his co-defendant and girlfriend, Nystrom, and allowed her to control him. 18 RR 791-92, 798, 816, 825-27, 838. As the court below noted, "[t]his evidence was not medical and did not go to Brewer's volition; it consists merely of lay observations that the woman was the alpha partner in the relationship." PA:A3 n.2.

[7] Brewer's initial attempt to obtain postconviction relief occurred in federal district court, where he unsuccessfully requested federal funding to exhaust his state court remedies. After the federal courts declined to intervene, the proceedings were dismissed without prejudice. *Brewer v. Johnson,* No. 96-11188 (5th Cir. 1996) (unpublished order); *Brewer v. Scott,* No. 2:95-CV-125 (N.D. Tex. 1997) (same); *Brewer v. Johnson,* 139 F.3d 491 (5th Cir. 1998).

relief. *Ex parte Brewer,* No. 46,587-01 (Tex. Crim. App. 2001) (unpublished order).

Brewer filed a habeas corpus petition in the federal district court on May 7, 2001, and the Director answered on June 28, 2001.[8] Ultimately, after the district court requested additional briefing concerning *Tennard v. Dretke,* 542 U.S. 274 (2004), relief was partially granted. PA:B3-5. As discussed *supra,* the Director appealed and the lower court reversed, holding that the state court correctly determined Brewer's mitigating evidence was *not* beyond the effective reach of the jury when it answered the former Texas special issues. PA:A5-9.

The court of appeals first noted that, "although some relevant evidence may receive constitutionally insufficient mitigating effect under the standard Texas special issues (*e.g.,* evidence of mental retardation), other evidence is quite capable of being given mitigating effect through that methodology." PA:A5. "For the mitigating evidence to be within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect." *Id.* "To determine whether a jury has sufficient vehicles for considering mitigating evidence, the habeas court must determine whether 'there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of the [mitigating evidence].'" PA:A6 (quoting *Johnson v. Texas,* 509 U.S. 350, 368 (1993)).

The lower court held that Brewer's "evidence of one hospitalization for a single episode of non-psychotic major depression" was not beyond the reach of the jury because it

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[8] Subsequently, Brewer unsuccessfully requested permission to raise additional claims. Brewer filed an amended petition "under protest" on September 30, 2002, and appealed the district court's order denying leave to amend. The court of appeals dismissed the appeal for lack of jurisdiction on February 5, 2003. *Brewer v. Cockrell,* No. 02-11310 (5th Cir. 2003) (unpublished order).

was not "chronic and/or immutable." PA:A7 (citing *Bigby v. Dretke*, 402 F.3d 551, 571 (5th Cir. 2005) (holding Bigby's "chronic and severe" schizophrenia, which "cannot be adequately controlled or treated," made him unable "to conform his behavior" or "avoid criminal behavior" and, thus, was beyond the scope of the special issues)). The court of appeals also held that Brewer's evidence of a "troubled childhood may, as a result of its temporary character, fall sufficiently within the ambit of the special dangerousness instruction." PA:A6-7 & n.16 (citing *Graham v. Collins*, 506 U.S. 461, 475-76 (1993)). Finally, the court below explained that "a jury can adequately incorporate evidence of short-term mental illness and substance abuse into its decision calculus." PA:A8.

The lower court denied rehearing on March 1, 2006. PA:A1.[9] The instant petition for certiorari review followed.

ARGUMENT

I. The Question Presented for Review Is Unworthy of the Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2005). Brewer advances no compelling reason in this case, and none exists. Moreover, this proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an

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[9] On rehearing, the court of appeals withdrew its earlier opinion, *Brewer v. Dretke*, 410 F.3d 773 (5th Cir. 2005), and substituted the current opinion in its place. PA:A1.

> unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254 (West 2005).

This Court has explained that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court precedent, yet reaches an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Alternatively, a state court "unreasonably applies" clearly established federal law if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

A federal habeas court's inquiry into unreasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams*, 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "[w]hether or not [this Court] would reach the same conclusion." *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002); *Williams*, 529 U.S. at 411. As the Court recently explained:

[T]he range of reasonable judgment can depend in part on the nature of the

> relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

Finally, it is the state court's "ultimate decision" that is to be tested for unreasonableness, "not every jot of its reasoning." *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001); *see also Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (holding that a federal court's "focus on the 'unreasonable application' test under section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence").

II. The Lower Court Correctly Determined That Brewer's Jury Was Able to Give Sufficient Effect to His Mitigating Evidence Within the Scope of the Special Issues.

In *Penry I,* this Court was forced to reconcile its plurality opinions in *Woodson v. North Carolina,* 428 U.S. 280, 303-04 (1976) (which requires that a capital-sentencing authority be allowed to consider mitigating circumstances), *Jurek,* 428 U.S. at 276 (explaining that the pre-1991 Texas special issues — deliberateness and future dangerousness — allowed Texas juries to consider mitigating circumstances), and the unique, double-edged mitigating circumstances presented in *Penry I* itself (mental retardation, brain damage, and severe child abuse). 492 U.S. at 320-25. The resultant decision was a carefully crafted and, ultimately, case-specific compromise.

A. *Penry I* and *Jurek*: most types of mitigating evidence can be considered in answering the former special issues.

At the root of *Penry I* are found the competing interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to adequately guide and channel a jury's consideration of these factors. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital-sentencing jury not be precluded from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings,* 455 U.S. at 111-12; *Lockett,* 438 U.S. at 604; *Woodson,* 428 U.S. at 303-04.

As the Court explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry I,* 492 U.S. at 319 (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). However, not all evidence presented as mitigating must be considered as such. *Franklin,* 487 U.S. at 174; *Skipper v. South Carolina,* 476 U.S. 1, 7 n.2 (1986). Nor is it constitutionally required that consideration of mitigating evidence be structured or balanced in any particular way. *Franklin,* 487 U.S. at 179; *Booth v. Maryland,* 482 U.S. 496, 502 (1987), *overruled on other grounds, Payne v. Tennessee,* 501 U.S. 808 (1991); *Zant v. Stephens,* 462 U.S. 862, 875-76 (1983).

Prior to the development of the rule in *Eddings,* the *Jurek* plurality held that the Texas special issues were constitutional because "the enumerated questions allow consideration of particularized mitigating factors," *e.g.*, a defendant's criminal record (or lack thereof), the

range of severity of such a record, his youth, the circumstances of the crime, duress and mental or emotional disturbance, and remorse.[10] 428 U.S. at 272-73. This conclusion was reaffirmed in *Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988), and in *Franklin*, 487 U.S. at 182.

Thereafter, the *Penry I* Court held that the Texas special issues, as applied to Penry, did *not* allow consideration of his specific evidence of mental retardation, brain damage, and severe child abuse. 492 U.S. at 322. This was because the evidence, which suggested that Penry was "less able ... to control his impulses or to evaluate the consequences of his conduct," did not necessarily suggest that his murderous actions were less than deliberate. *Id.* Additionally, Penry's evidence indicated that he was unable to "learn from his mistakes," and was relevant to the future-dangerousness special issue *only* as an *aggravating* factor. *Id.* at 323. Thus, neither special issue provided a vehicle for the jury to give mitigating effect to Penry's "two-edged" evidence. *Id.* at 324. Yet the Court specifically noted that its *Penry I* opinion did *not* negate the facial validity of the Texas special issues, nor did it change the fact that other types of mitigating evidence *could* be considered under the plain language of the special issues. *Id.* at 315-19.

During its next term, the Court acknowledged the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde v. California*, 494 U.S. 370, 380 (1990). Accuracy is important, but finality equally so. *Id.* As a result, the Court crafted a legal standard for reviewing ambiguous jury instructions that relies not on subjective and hypothetical hairsplitting but on objective and reasonable analysis. *Id.* at 378-81. The Court held that a *mere possibility* that the jury was precluded

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[10] Brewer fails to cite *Jurek* whatsoever or acknowledge that it remains controlling authority. *See Graham*, 506 U.S. at 474-77 (explaining that *Penry I* is the exception to *Jurek*).

from considering relevant mitigating evidence did *not* establish Eighth Amendment error. *Id.* at 380. Rather, such error occurred only if there was a "reasonable likelihood" that the jury applied its instructions in a way that prevented the consideration of such evidence. *Id.*

Indeed, the Court would continue to endorse *Jurek* and limit the application of *Penry I* where the mitigating evidence presented was not *solely aggravating* when viewed through the lens of the special issues. For example, in *Graham*, the Court declined to "read *Penry* [*I*] to effect a sea change in the Court's view of the constitutionality of the ... Texas death penalty statute." 506 U.S. at 474. Instead, the Court distinguished the thrust of Graham's mitigating evidence — "that his brief spasm of criminal activity ... was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated" — from Penry's. *Id.* at 475. The "mitigating significance" of Graham's evidence did not compel affirmative answers to the special issues as did Penry's evidence, but instead suggested that Graham would *not* be a future danger. *Id.* at 475-76. Thus, as in *Boyde*, the possibility that mitigating evidence might have "*some* arguable relevance beyond the special issues" was immaterial as long as the jury was able to give effect to the evidence in some meaningful way. *Id.* at 476 (emphasis in original).

In *Johnson*, the Court concluded that "[i]t strains credulity to suppose that the jury would have viewed the evidence of [Johnson]'s youth as outside its effective reach in answering the [future-dangerousness] special issue." 509 U.S. at 368. This is the case even if the mitigating evidence could also be viewed as aggravating; constitutional error results only if the evidence is unavoidably aggravating within the context of the special issues. *Id.* at 368-69; *cf. Coble v. Dretke*, 444 F.3d 345, 361 (5th Cir. 2006) ("The requirements of the Eighth Amendment are satisfied even if evidence is aggravating, as long as the mitigating aspect is within the effective reach of the jury") (internal quotations omitted); *Cole v. Dretke*,

418 F.3d 494, 507 n.54 (5th Cir. 2005) ("[A] jury cannot give mitigating effect to evidence that can be seen as *aggravating only*") (emphasis in original). Few types of mitigating evidence will have only aggravating relevance within the special issues. Indeed, this is precisely what the lower court held. *See* PA:A8 (*Penry I* error results where "the only logical manner in which [the] jury could have considered the [mitigating] evidence [] under the future-dangerousness special issue was as an aggravating factor").

B. *Tennard* and constitutional relevance

As the court below accurately explained:

> In following *Penry I*, this [C]ourt developed a two-part test for determining whether the defendant's evidence requires a special mitigation instruction: (1) whether the proffered material was constitutionally relevant mitigating evidence and (2) whether the proffered evidence was beyond the effective reach of the jurors.[11] We in turn defined "constitutionally relevant" evidence as that which was "due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own ...."[12] In *Tennard*, however, the Supreme Court flatly rejected that test of constitutional relevance and instructed us instead that the definition of relevance in this context is no different from the definition of relevance in most others: "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence ...."

PA:A5.

In essence, the *Tennard* Court chastised the Fifth Circuit for invoking "its own restrictive gloss on *Penry I*" — constitutional relevance — as a screening test. 542 U.S. at 283. The Court explained that this was "an improper legal standard." *Id.* at 287. Instead,

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[11] *Smith v. Cockrell*, 311 F.3d 661, 680 (5th Cir. 2002) (internal citations and quotations omitted).

[12] *Graham v. Collins*, 950 F.2d [at] 1029 [], *aff'd*, 506 U.S. 461 [] (1993).

> [T]he "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context, and thus the general evidentiary standard — "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" — applies.

Id. at 284 (quoting *McKoy v. North Carolina,* 494 U.S. 433, 440 (1990)). "Once this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." *Id.* at 285 (quotations and citations omitted).

C. *Smith*'s "full effect" requirement means nothing more than *sufficient* effect.

The Court's opinion in *Smith v. Texas,* 543 U.S. 37 (2004), noted its ruling in *Tennard* but focused on an entirely different issue: a nullification instruction similar to the one addressed in *Penry v. Johnson,* 532 U.S. 782 (2001) (*Penry II*). This instruction "did not provide the jury with an adequate vehicle for expressing a 'reasoned moral response' to all of the evidence relevant to the defendant's culpability." *Smith,* 543 U.S. at 45-48 (quoting *Penry II,* 532 U.S. at 796) (emphasis in original). This is because the nullification instruction "'essentially instructed [the jury] to return a false answer to a special issue in order to avoid a death sentence.'" *Id.* at 48 (quoting *Penry II,* 532 U.S. at 801). Importantly, no nullification instruction was submitted in the instant case. In this sense, *Smith* — and *Penry II* — are not on point.

Brewer suggests, however, that *Smith* and *Penry II* dramatically changed the meaning of *Penry I.* Relying on *dicta* in both opinions, he proposes that Eighth Amendment error occurs if "*full* consideration and *full* effect" are not given to the mitigating evidence. *Smith,* 543 U.S. at 37 (citing *Penry II,* 532 U.S. at 797). Thus, Brewer argues that *Smith* implicitly

overruled *Johnson, Graham,* and *Boyde,* converting the reasonable-likelihood harm analysis of those cases into a presumed-harm standard. However, this is not the case, as the court below explained:

> For the mitigating evidence to be within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect. Whether that sufficiency requires that the evidence be given "full," or merely "some," mitigating effect has been the subject of considerable discussion in this court, but ultimately the distinction is only one of semantics, because regardless of what label is put on the word "effect," it is indisputable that the effect must be constitutionally "sufficient." Even if the requirement is called "full," it means nothing more than "sufficient."

PA:A5; *cf. Tennard v. Dretke,* 442 F.3d 240, 256 (5th Cir. 2006) ("The key inquiry ... is whether the jury could give sufficient *mitigating* effect to Tennard's evidence") (emphasis in original); *Cole,* 418 F.3d at 499 (special issues "must confer sufficient discretion on the sentencing body to consider the character and record of the individual offender") (internal quotations omitted); *Bigby,* 402 F.3d at 564 (same) (quoting *Graham,* 506 U.S. at 468).

The lower court's reasoning is sage. The *Smith* Court certainly did not overrule *Jurek* and hold that the former special issues were invariably inadequate for the consideration of mitigating evidence. Rather, the Court merely held that Smith's evidence, as presented, was not all within the effective reach of the jury. The "*full* consideration" language in *Smith* is quoted directly from Justice O'Connor's dissent in *Johnson,* as quoted in *Penry II. Smith,* 543 U.S. at 38, 46 (quoting *Penry II,* 532 U.S. at 979 (quoting *Johnson,* 509 U.S. at 381)). This language is merely *dicta,* because it would otherwise overrule *Jurek.* This Court previously held that no such "sea change" occurred in light of *Penry I. Graham,* 506 U.S. at 474. It should not so hold now. *Cf. Coble,* 444 F.3d at 358 ("The Supreme Court's rulings in *Penry II* and *Smith* should not be read to disturb its earlier holdings affirming the

constitutionality of Texas'[s] statutory death penalty sentencing scheme") (quoting *Bigby*, 402 F.3d at 570); *Tennard*, 442 F.3d at 253 n.17 (declining to interpret *Smith* and *Tennard* as new rules); *Cole*, 418 F.3d at 508 ("Neither *Tennard* nor *Smith* changes *Johnson*'s analysis of *Penry*, or the result that we reach today"); *In re Kunkle*, 398 F.3d 683, 685 (5th Cir. 2005) (*per curiam*) ("We are not persuaded that the Court intended to undercut *Jurek*, *Graham*, and *Johnson* without even citing them. Whether ... *Smith* sweep[s] so broadly as to create a conflict with its own *Jurek* or *Graham* decisions is for the Supreme Court").

As discussed above, the Court has recognized that, in most cases, the former special issues remain constitutional because they "allow consideration of particularized mitigating factors." *Jurek*, 428 U.S. at 272-73. The fact that mitigating evidence might have "*some* arguable relevance beyond the special issues" is immaterial because "virtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues." *Graham*, 506 U.S. at 476 (citing *Franklin*, 487 U.S. at 190 (Stevens, J., dissenting)) (emphasis in *Graham*). To demonstrate Eighth Amendment error, there must exist more than "the mere possibility" that the jury was prevented from giving effect to mitigating evidence. *Johnson*, 509 U.S. at 367. A "*full* consideration" rule would fly in the face of this valid and binding precedent.

Thus, when *Penry I* and its progeny are viewed as a whole, the following Eighth Amendment inquiry may be derived: (1) whether the mitigating evidence has met the low threshold for relevance established in *Tennard* and, if so, (2) whether the evidence was within the effective reach of the jury in answering the special issues. 542 U.S. at 284-85; *cf. Coble*, 444 F.3d at 358; *Bigby*, 402 F.3d at 564-65. As the court of appeals explained, "[f]or the mitigating evidence to be within the effective reach of the jury in answering the special

issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect." PA:A5; *cf. Tennard,* 442 F.3d at 257; *Cole,* 418 F.3d at 499; *Bigby,* 402 F.3d at 564. Of course, this inquiry is subject to the deferential standard of 28 U.S.C. § 2554(d)(1). PA:A3-4; *cf. Tennard,* 542 U.S. at 288-89; *Coble,* 444 F.3d at 349-50; *Tennard,* 442 F.3d at 254. Moreover, the lower court's *Penry* jurisprudence — addressing which kinds of mitigating evidence may be given sufficient effect within the special issue framework — survived *Smith* and *Tennard* where it did not rely upon constitutional relevance. PA:A6-7 nn.16-18.

D. The court below properly rejected Brewer's *Penry I* claim.

Brewer's mitigating evidence is relevant within the meaning of *Tennard.*[13] However, there is no *reasonable* likelihood the jury was precluded from giving constitutionally sufficient mitigating effect to it in answering the Texas future-dangerousness special issue.[14] Initially, the court below correctly held that Brewer's minimal evidence of child abuse was within the purview of future dangerousness especially where, as here, the possibility of rehabilitation was highlighted by the defense. PA:A6-8 & n.16 (citing *Graham,* 506 U.S. at 475, *Jacobs v. Scott,* 31 F.3d 1319, 1327 (5th Cir. 1994), and *Cole,* 418 F.3d at 507); 19 RR 878, 884-85; *cf. Clark v. Collins,* 19 F.3d 959, 963 (5th Cir. 1994) (applying *Johnson* — not constitutional relevance — to hold child abuse within the scope of future dangerousness

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[13] Brewer's evidence that his girlfriend was the dominant partner in their relationship is *not* constitutionally relevant, because it is "unlikely to have any tendency to mitigate [his] culpability," and will not be discussed further. *Tennard,* 542 U.S. at 286.

[14] Brewer does challenge the lower court' s decision with regard to his mitigating evidence of marijuana use. Nonetheless, a reasonable jury could easily conclude that Brewer did not act deliberately due to intoxication, or would not be a future danger in prison without access to drugs. *Harris v. Cockrell,* 313 F.3d 238, 242 (5th Cir. 2002); *James v. Collins,* 987 F.2d 1116, 1121 (5th Cir. 1993). Thus, such evidence was within the purview of the special issues.

especially where possibility of rehabilitation exists).

Brewer was not even abused until he was fifteen years old, a fact that stands in marked contrast to *Smith* and *Penry II*. There was no evidence that the abuse "in any way impaired his cognitive abilities." PA:A3 n.3. Thus, the evidence was certainly not *aggravating* within the scope of the future-dangerousness issue. *See, e.g., Robertson v. Cockrell*, 325 F.3d 243, 254 (5th Cir. 2003) (*en banc*); *Lackey v. Scott*, 28 F.3d 486, 490 (5th Cir. 1994); *Motley v. Collins*, 18 F.3d 1223, 1235 (5th Cir. 1994). Importantly, neither *Smith* nor *Penry* dealt with the issue in isolation. *See Penry I*, 492 U.S. at 322-23 (explaining that it was Penry's lack of impulse control and inability to learn from his mistakes that gave rise to error); *Robertson*, 325 F.3d at 253 ("Childhood abuse alone is not systematically discussed by *Penry I* in its relation to the Texas special issues"). Brewer's evidence of child abuse — especially the minimal amount of abuse suffered — is, without a doubt, within the scope of future dangerousness.

The lower court has rejected post-*Tennard* Eighth Amendment claims based on very similar evidence of a troubled childhood:

> This [C]ourt ... has also held that evidence of a defendant's "unstable" and "transient" childhood could be given effect under the special issues. *Jacobs v. Scott*, 31 F.3d [at] 1327 [] (citing *Graham v. Collins*, 506 U.S. 461 []). In *Jacobs*, we distinguished evidence of a troubled childhood offered by the defendant from that in *Penry I*. *Id.* Jacobs argued that:
>
> > evidence was presented showing that Mr. Jacobs had an unstable, troubled childhood. He never knew his mother, and has only vague memories of his father. His father left him to live alone with strangers when he was a small boy, and Mr. Jacobs never saw him again. Mr. Jacobs ended up living in several foster homes as a child, separated from his sister, parents, and all other family connections.

> *Id.* Coble had a troubled childhood similar to that of Jacobs and Graham, "as opposed to a childhood rife with harsh physical abuse like that of Penry." *Id.* Coble's evidence of his troubled childhood included: (1) the death of his father before he was born; (2) poverty in childhood; (3) his stepfather's alcoholism and conflicts with his mother; and (4) his mother's nervous breakdown. His evidence of his childhood is more "transient" and "unstable," like the evidence presented in *Jacobs* and *Graham* than it is similar to Penry's evidence of abuse.[15] Coble's evidence is distinguishable from that in *Penry*.

Coble, 444 F.3d at 362. As in *Coble*, *Jacobs*, and *Graham*, Brewer's childhood troubles — a neglectful and briefly abusive father — were well within the reach of the jury in answering the future-dangerousness special issue.

Similarly, the lower court properly reasoned that the evidence Brewer "had a bout with depression three months before the murder" and "was briefly hospitalized for that depression" was well within the scope of the future-dangerousness issue. PA:A6-7 & nn.17-18. While Brewer argues that he was involuntarily committed, the record reveals that Brewer actually signed "voluntary papers stating that he had signed a request for voluntary admission" to Big Spring State Hospital. 18 RR 759; *Brewer v. State*, slip op. at 15. The jury was fully aware that the initial "involuntary" commitment was initiated by Brewer's

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[15] Graham produced evidence of his childhood poverty, his parents' separation, and his mother's "nervous condition." *Graham*, 506 U.S. at 463-64. As this Court explained:

> we are not convinced that *Penry* could be extended to cover the sorts of mitigating evidence Graham suggests without a wholesale abandonment of *Jurek* and perhaps also of *Franklin v. Lynaugh*. As we have noted, *Jurek* is reasonably read as holding that the circumstance of youth is given constitutionally adequate consideration in deciding the special issues. We see no reason to regard the circumstances of Graham's family background and positive character traits in a different light. Graham's evidence of transient upbringing and otherwise nonviolent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse.

Id. at 475.

family based upon a suicide note and nothing more. 18 RR 763. In fact, Brewer's mother testified that he "committed himself" because "he wanted to turn his life around" and "get off of drugs." *Id.* at 825-26. Brewer later checked himself out of Big Spring State Hospital to live with Nystrom in Amarillo. *Id.* at 826-27. Therefore, the record plainly refutes Brewer's effort to characterize his depression as an incurable or untreated mental illness that limited his impulse control. Indeed, Brewer presented no expert opinion on the matter. PA:A2, 6 n.16.

Nevertheless, Brewer's evidence was plainly within the jury's reach because treatable mental problems can be given sufficient mitigating effect in answering the future-dangerousness inquiry. *See Hernandez v. Johnson,* 248 F.3d 344, 349 (5th Cir. 2001) (holding "evidence of chronic schizophrenia could be considered by the jury in answering the question of future dangerousness," because "[w]ith medication and treatment, remission can be sustained"); *Robison v. Johnson,* 151 F.3d 256, 265-67 (5th Cir. 1998) (holding that evidence of petitioner's schizophrenia, including testimony that it was treatable and could go into remission, could be given mitigating effect under the future-dangerousness special issue); *Lucas v. Johnson,* 132 F.3d 1069, 1082-83 (5th Cir. 1998) (finding evidence that a defendant was psychotic and schizophrenic, but that his mental problems had responded to antipsychotic drugs and was treatable, could be considered under the future-dangerousness special issue); *Demouchette v. Collins,* 972 F.2d 651, 653 (5th Cir. 1992) (holding that a jury was able to consider the mitigating effect of evidence of personality disorder under first special issue where major thrust of evidence was that the disorder caused defendant to act impulsively rather than deliberately).

Recent, post-*Tennard* circuit precedent affirms the reasoning of these opinions. *See Coble,* 444 F.3d at 361-62 (holding treatable bipolar and posttraumatic stress disorders within

scope of future-dangerousness issue); *Cole*, 418 F.3d at 505-07 (holding organic neurological deficiency including diminished impulse control within scope of future-dangerousness issue); *but see Tennard*, 442 F.3d at 256 (finding *Penry* violation where evidence showed low IQ, a "static trait" or "permanent physiological feature"); *Bigby*, 402 F.3d at 571 (paranoid schizophrenia not amenable to treatment or control not within scope of future dangerousness). A treatable mental disorder or an exceedingly ordinary problem like depression is distinctly different from a chronic mental illness, like Penry's, that prevents a defendant from ever learning from his or her mistakes. *Cole*, 418 F.3d at 505-07; *cf Bigby*, 402 F.3d at 571 ("Even after being in the controlled environment of jail for some time, Bigby irrationally tried to take the trial court judge hostage in the presence of armed bailiffs," demonstrating inability to conform conduct with law).

Brewer argues that the lower court's decision runs afoul of *Smith* and *Tennard* by attempting to revive the "severity" and "permanence" elements of the former constitutional relevance test. Yet this Court noted that "gravity" has a place in the *Penry I* calculus "insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability." 542 U.S. at 286 (citation omitted). Gravity is a synonym for severity, seriousness, or importance. THE AMERICAN HERITAGE COLLEGE DICTIONARY 595 (3d ed. 2000). Similarly, transient or impermanent characteristics are less likely to mitigate culpability. Either concept certainly bears whether the likelihood of *Penry I* error is reasonable. Any other interpretation would lead to a *per se*-error analysis and overrule *Jurek*, *Graham*, and *Johnson*.

Moreover, *Tennard* and *Smith* do not support Brewer's argument, because the opinions deal only with the application of severity or permanence as a "screening test" which might foreclose reaching "the heart of [a petitioner]'s *Penry* claims." *Tennard*, 542 U.S. at

282-86. Here, the court of appeals *did* reach the heart of Brewer's *Penry* claim and discussed each category of the evidence. In fact, Brewer reads far too much into *Tennard* and *Smith* when he suggests that they dispense with any comparative analysis of the mitigating evidence. Reasonableness can hardly be judged in the absence of such comparisons.

Finally, unlike *Tennard,* the prosecutor did not ask the jury to consider Brewer's mitigating evidence as aggravating. The prosecuting attorney certainly argued the State had carried its burden of proof concerning Brewer's probable future dangerousness. 19 RR 897-98. But the prosecutor based this argument on the *aggravating* evidence presented by the State, not Brewer's mitigating evidence. For example, the State asked the jury, "What kind of man can say that he loves a woman and slam her with this kind of force up against a locker?"[16] *Id.* at 897. The prosecuting attorney also pointed out that, "[b]y the time [Brewer] is [fifteen] years of age, from that time on, he carries weapons, he carries knives ... [t]o hurt people."[17] *Id.* The State's argument that Brewer would "never change," 19 RR 898, was merely a legitimate response to defense counsel's suggestion that Brewer could be rehabilitated if sentenced to life in prison. *Id.* at 878, 884-85. Importantly, however, the prosecutor did not "press[] exactly the most problematic interpretation of the special issues, suggesting that [Brewer's mitigating evidence] was irrelevant in mitigation, but relevant to the question whether he posed a future danger." *Cole,* 418 F.3d at 508 (quoting *Tennard,* 542 U.S. at 289).

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[16] The State presented evidence that Brewer assaulted his former girlfriend, Amy Forrester, by picking her up and shoving her against the edge of a metal locker, thereby paralyzing her right arm for nearly two years. 18 RR 592-97.

[17] There was testimony that Brewer was sent to an alternative school on more than one occasion for threatening another child with a knife and for fighting, and that he was arrested carrying a concealed knife in a neighborhood known for drug activity. 18 RR 640-41, 657-61.

III. The State Court Reasonably Rejected Brewer's *Penry I* Claim.

On direct appeal, the Court of Criminal Appeals carefully considered Brewer's *Penry* claim and reasonably applied the appropriate Supreme Court precedent. Initially, the state court's explication of the Eighth Amendment's evolution from *Jurek* to *Penry* via *Lockett, Eddings,* and *Franklin* was a proper statement of the law. *Brewer v. State,* slip op. at 13-14. The court then correctly explained that, in addressing a *Penry I* claim, it must determine:

> (1) what mitigating evidence was presented to the jury; (2) whether the [deliberateness and future-dangerousness] issues provided a vehicle for the jury to give effect to that evidence and, if not, (3) whether the trial judge provided, in its charge to the jury on punishment, a vehicle for the jury to effectively consider the mitigating evidence.

Id. at 14 (citing *Joiner v. State,* 825 S.W.2d 701, 706 (Tex. Crim. App. 1992)).

Finally, the court "conclude[d] the [future-dangerousness] issue provided an adequate vehicle for the jurors to give effect to [Brewer]'s mitigating evidence." *Id.* at 15. The court noted that "a stay in a mental hospital does not evidence a long term mental illness which would affect [Brewer]'s ability to conform to the requirements of society." *Id.* (internal quotations omitted). The court also held that Brewer's evidence of drug abuse and a troubled childhood was within the scope of the future-dangerousness special issue. *Id.* As explained *supra,* this holding is not contrary to the Court's precedent nor is it an unreasonable application thereof.

CONCLUSION

For the foregoing reasons, the Court should deny Brewer's petition for writ of certiorari.

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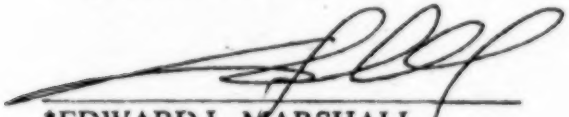

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